

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 97-F-14

Date issued: December 10, 1997

Requested by: Honorable Earl Rennerfeldt, State Representative

- QUESTION PRESENTED -

Whether a clerk of district court may issue a writ of execution to collect child support arrearages pursuant to North Dakota Century Code (N.D.C.C.) § 28-21-05.2.

- ATTORNEY GENERAL'S OPINION -

It is my opinion that a clerk of district court may not issue a writ of execution for the purpose of collecting child support arrearages under N.D.C.C. § 28-21-05.2, but must do so upon request under other appropriate code provisions.

- ANALYSIS -

N.D.C.C. § 28-21-05.2 permits the Department of Human Services (Department) to issue executions to collect unpaid child support under certain circumstances. N.D.C.C. § 28-21-05.2, which became effective July 1, 1997, provides:

1. Notwithstanding the provisions of section 28-21-05, if a judgment has been docketed under section 14-08.1-05 in an amount greater than six times the monthly child support obligation and the judgment debtor is not current in a court-established plan to repay the unpaid child support judgment, the department of human services may issue an execution, against the property of the judgment debtor, to the sheriff of any county in which the property may be found.
2. A writ of execution issued by the department of human services must be issued as provided in section 28-21-06, except the writ may omit:
 - a. The seal of the court;
 - b. The subscription of the clerk of that court;
 - c. A statement of the courts and counties to which the judgment has been transcribed; and

- d. If the writ is issued to a sheriff of a county other than the county in which the judgment is docketed, a date and time of docketing in that sheriff's county.
3. A writ issued by the department of human services is returnable to the department.

1997 N.D. Sess. Laws ch. 404, §§ 46, 87. See also N.D.C.C. § 50-09-08.5 (providing that the Department may issue executions under N.D.C.C. ch. 28-21 to collect past due child support) (1997 N.D. Sess. Laws ch. 404, §§ 63, 87). The Department may issue an execution to collect unpaid child support (1) "if a judgment has been docketed under section 14-08.1-05," (2) the amount of the judgment is more than six times the monthly support obligation, and (3) the judgment debtor is not current "in a court-established plan to repay the unpaid child support judgment." N.D.C.C. §§ 28-21-05.2, 50-09-08.5. This is an exception to what has been the rule that a clerk of court issues executions. See generally N.D.C.C. §§ 28-21-05, 28-21-06.

A clerk of court is specifically authorized to issue executions under similar circumstances where an order for payment of child support has been docketed under N.D.C.C. § 14-08.1-05. Under that section, there is no requirement that the amount of the unpaid obligation be more than six times the monthly child support obligation or that the judgment debtor not be current under a court-established plan of repayment. N.D.C.C. § 14-08.1-05(1)(a) provides the mechanism for reducing any order requiring payment of child support to amounts certain for purposes of docketing as a judgment, and requires that the unpaid order be entered in the judgment docket upon request of the judgment creditor or judgment creditor's assignee. See N.D.C.C. §§ 28-20-13, 28-20-16 (regarding docketing of money judgments by the clerk of district court); see also Rule 58, N.D.R.Civ.P. (providing that judgment for payment of a sum certain or a sum which can be calculated is to be docketed by the clerk of court in the judgment docket); Supreme Court North Dakota Clerk of Court Manual sections 2.13, 2.14, 2.15 (regarding docketing of judgments).

N.D.C.C. § 14-08.1-05(2) provides that "[a]ll remedies for the enforcement of judgments apply" to a judgment for the support of a child. See also Johnson v. Johnson, 527 N.W.2d 663, 668 (N.D. 1995) (observing that the remedy of contempt to enforce court-ordered child support is an additional remedy, regardless of the availability of execution). "A party or the party's assignee may also execute on the judgment." N.D.C.C. § 14-08.1-05(2). Thus, the Department as

assignee of a judgment for payment of child support or arguably, as agent for a party to such a judgment, may have an execution issued by the clerk of court in lieu of issuing an execution pursuant to N.D.C.C. §§ 28-21-05.2 and 50-09-08.5.

Applying similar statutes to those in N.D.C.C. chs. 14-08.1 and 28-21, the Alaska Supreme Court held that the state child support enforcement office acting on behalf of a custodial parent was entitled to have unpaid child support reduced to a judgment and to obtain an unconditional writ of execution to collect on that judgment. State v. Demers, 915 P.2d 1219, 1220 (Alaska 1996). This decision is consistent with the general rule that issuance of an execution upon request of a party does not involve a clerk's discretion, but is a ministerial act the clerk must perform on behalf of the court, and a writ of mandamus is therefore appropriate if the clerk refuses to issue an execution. In re Marriage of Farner, 265 Cal.Rptr. 531, 534 (Cal. Ct. App. 1989); Bonelli v. Mostyn, 136 A.2d 807, 809 (Conn. Super. Ct. 1957); Downing v. Lynch, 354 P.2d 394, 395 (Okla. 1960) (quoting 33 C.J.S. Executions § 56 (1942)); Sunn v. Ligon, 430 S.W.2d 704, 707 (Tex. App. 1968). The clerk's only role is to determine whether a judgment has been docketed. See Downing, 354 P.2d at 395. See also N.D.C.C. §§ 1-01-49 (process means a writ) and 11-17-01 (providing the clerk of district court shall issue all process required to be issued). Therefore, it is my opinion that while N.D.C.C. § 28-21-05.2 does not authorize a clerk of court to issue an execution to enforce a child support judgment, N.D.C.C. §§ 14-08.1-05 and 28-21-06 require the clerk to do so once a judgment is docketed and a party or assignee requests that a writ be issued.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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